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PRIORITY BETWEEN PURCHASE MONEY AND LABORER'S LIENS.

PRIORITY AS BETWEEN CREDITORS OF A MINING AND MANUFACTURING COMPANY IN A DEED OF TRUST GIVEN TO SECURE THE PURCHASE PRICE OF PROPERTY SOLD TO SAID COMPANY, AND EMPLOYEES OF SAID COMPANY ASSERTING LIENS UNDER § 2485 OF THE CODE OF VIRGINIA.

By recently refusing an injunction, by which certain employees of the Eureka Soapstone Company sought to restrain the trustees in a deed of trust given by the said Eureka Soapstone Company to secure the purchase price of property bought by the said company, in a chancery cause brought to subject the property of the Plumbers Soapstone Company from paying out the proceeds of the sale of said property, the Court of Appeals, or rather four members of that court, have settled the law in Virginia as to the priority of the creditors in a deed of trust given to secure the purchase price of property bought by a manufacturing and mining company over the labor liens asserted by the employees of the company. This question had never before been before the Court of Appeals, and in fact had never before been passed upon except by Judge Paul, as will be referred to below, by any court in Virginia, so far as I have been able to ascertain.

The facts, so far as they are necessary to an understanding of the matter, are as follows:

The Plumbers Soapstone Company was a corporation, engaged in Nelson County, Va., in quarrying and manufacturing soapstone. Having become involved, a chancery suit was brought by the S. Flory Manufacturing Company in the Circuit Court of Nelson County to subject its property real and personal to the payment of a judgment recovered against it for a large sum, and to the payment of the execution issued thereon.

In that suit G. E. Caskie, A. R. Long, John G. Haythe and

S. B. Whitehead were appointed commissioners to make sale of its property. They made various efforts to do so, and finally did make sale of all of its property to the Eureka Soapstone Company, a corporation organized to carry on the soapstone business.

The price agreed upon was sufficient to pay the costs of the suit, which, together with some small debts, were paid in cash, and all of the debts of the Plumbers Soapstone Company, the said Eureka Soapstone Company to execute separate bonds to all of said creditors, with interest upon the same, payable annually and evidenced by coupons, five years after date. Then, if ratified by the court, a deed was to be made by a Commissioner of the court in the said suit to the Eureka Soapstone Company and contemporaneously a deed of trust was to be executed by the Eureka Soapstone Company to secure said bonds.

The court ratified the arrangement and appointed a commissioner to execute a deed to the property to the Eureka Soapstone Company, and directed that the deed of trust, which was filed in the cause from the Eureka Soapstone Company, to secure the creditors of the Plumbers Soapstone Company, should, at the time of the delivery of the deed, be withdrawn and put to record. This was accordingly done. For several years the interest coupons were paid, and the Eureka Soapstone Company paid its employees, and there was no trouble.

During the year 1913, however, the Eureka Soapstone Company defaulted in the payment of its interest, and the bonds having also become due, G. E. Caskie, A. R. Long, Jno. G. Haythe and S. B. Whitehead, the trustees in the above deed of trust, were required by the creditors secured in the deed of trust to foreclose the same. They advertised it to be sold in accordance with the terms of the deed of trust.

In the meantime various of the laborers of the Eureka Soapstone Company had filed in the clerk's office of Nelson County their liens under § 2485 of the Code of Virginia. These laborers then applied to the judge of the Circuit Court of Nelson County for an injunction to restrain the trustees from selling the property of the Eureka Soapstone Company until the priority of their lien could be settled.

A temporary injunction was granted by the judge, but by consent it was waived with the understanding that a sale should be

made by the trustees, who, however, were not to distribute the proceeds until the matters had been passed upon. A sale of the property was made, but not for enough to reach the labor lien, if the amounts due under the deed of trust were first paid.

At the November term, 1913, of the Circuit Court of Nelson County, an application was made by the labor lienors of the Eureka Soapstone Company to the court for an injunction restraining the trustees from paying out the proceeds of the sale. In accordance with the understanding the trustees appeared and demurred and answered the bill, which, with the exhibits filed with it, and those filed with the answer showed the whole state of facts, and thereupon the court refused to grant the injunction.

By an agreement between the counsel on each side, application was then, on December 19, made to Judge Keith for an injunction, the counsel for the labor lienors and the trustees both appearing before Judge Keith. He did not pass upon it, stating that, as it was a new question with authorities on each side, he preferred for it to be passed upon by the full court.

Finally, on January 7, 1914, the injunction was refused, the indorsement on the bill simply being, "Injunction refused. James Keith, Stafford G. Whittle, John A. Buchanan, George M. Harrison."

There were filed with the papers notes setting forth the authorities relied upon by each side.

So the matter may be considered as settled in Virginia.

As I said before, the question has never before been in any way passed upon by the Court of Appeals, and has only once, so far as I can find, been decided in Virginia, and that by Judge Paul in the case of M. A. Furbish & Son Mach. Co. *v.* Liberty Woolen Mills, reported in 81 Federal Reports 435, and referred to in a note to § 2485, Pollard's Code. In this case one side was represented by M. P. Burks, and the other by S. V. Southall, of Charlottesville, so we may be sure, it was properly argued.

For the benefit of those who may not have the above reports I will quote from Judge Paul's opinion on page 429:

> "The contention here is, that no matter when or by whom a mortgage or deed of trust is executed on property held by a manufacturing company, such mortgage or deed of trust can be invaded by the statutory lien for wages, made subsequent

thereto, and the creditors deprived of a security taken from an entirely different company from that contracting for the labor, and against which the labor claim is asserted. This was not the intention of the legislature. The destruction of property rights here contended for was not contemplated by the passage of the law for the protection of laborers. In this State it is frequently the case, where a party sells land, instead of reserving a lien in the deed of conveyance, to secure the deferred payments of purchase money, he makes a conveyance without such reservation, but contemporaneously takes from the purchaser a deed of trust on the property as security for the payment of the purchase money. If the purchaser of a tract of land should be a manufacturing company, and execute a deed of trust to secure the payment of the purchase money, according to the contention of the counsel for the claimants of the labor liens in this case, the deed of trust so given would be subordinate to the security taken by the vendor for the payment of the purchase money for the land, which he has sold to the manufacturing company. The simple statement of this proposition. it seems to the court, is a complete refutation of its correctness. Such gross wrong in the deprivation of one man of his property in order to pay the debts of another, is contrary to every rule of right and justice known to the laws of this commonwealth, and can not receive the sanction of this court."

On the side of the labor lienors several decisions were quoted—one from Indiana and several from Georgia. These seem to be the only States in which this matter has been decided.

The Indiana case is that of Small *v.* Hames et als., 60 N. E. 342. I have not seen the report, but an item of the syllabus is as follows:

"Acts of 1885, p. 95, Burns' Rev. St. 1894, § 7051, provides that, when the business of any person shall be suspended by the action of creditors, the debts owing to employees for labor to an amount not to exceed $50 each for work performed within six months next proceeding the seizure of the property of such person shall be treated as preferred debts, and shall be first paid in full. Held, the workmen employed by a newspaper company were entitled under the statute to the payment of their wages to the extent of $50 each prior to any rights of mortgages foreclosing the printing outfit under mortgages given for the purchase price thereof."

In Georgia there seems to be a difference as to the manner in which a laborer perfects his lien upon personal property and real estate. And the lien, given to laborers applies to all laborers. Three cases with reference to this matter have been before the Supreme Court of Georgia.

First, Georgia Loan, Savings & Banking Company *v.* Dunlop et als. 33 S. E. 882. In a part of the opinion Judge Cobb said: "It is contended, however, that this rule is not applicable to the present case, because the mortgage in this case was given to secure the payment of the purchase money on the property upon which the laborer's liens are sought to be enforced. We know of no law, which places a purchase money mortgage upon personalty upon any different footing in regard to the matter now under consideration, from that of an ordinary mortgage upon such property."

This doctrine was reaffirmed in the case of Baiden & Co. *v.* Holmes-Hartfield Co. et als., 60 S. E. 1031, and in the case of Bradley *v.* Cassell et als., 43 S. E. 857.

As said above, all these cases applied only to liens upon personalty, and of course were governed by the peculiar phraseology of the statute.

Neither the Circuit Court nor the judges of the Court of Appeals gave any reason for the action in refusing an injunction. But no doubt they had in mind or rather thought that the property conveyed to the Eureka Soapstone Company, and upon which contemporaneously a deed of trust was executed to secure the purchase money was not in reality the property of the Eureka Soapstone Company until the deed of trust was paid.

Section 2485 above referred to is in part in the following words: "And on all the real and personal property of said company which is used in operating the same." Suppose in the case above that the court had sold the property of the Plumbers Soapstone Company to the Eureka Soapstone Company, and had had no deed executed. Although the property bought by the Eureka Soapstone Company was its property in a limited sense, still no one would ever for a moment dream that a laborer of the Eureka Company could, by a lien, acquire priority over the purchase money due to the court. And in reality there is no dif-

ference between such a case as that and the one under consideration, the only distinction being that in one case, in order to enforce the lien for the unpaid purchase money, the court would have had the property sold by its commissioners and in the other the lien would be enforced by the trustees acting under the deed of trust. The distinction is one of form, rather than reality. This being so, I think it is now established law in Virginia, regardless of what it is in any other State, that a laborer who has a lien upon the property of a mining and manufacturing company under § 2485 of the Code of Virginia, takes it in subordination to the lien for the purchase money of the property, secured by a deed of trust executed simultaneously with the conveyance to it of the property.

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